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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 475

GRADY LEE McHUGH,
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA**

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Florida is reported in 36 So. 2d 786.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229; 43 Stat. 937; 28 U. S. C. A. 344, upon the claim that he was subjected to double jeopardy in the State Court and that he is entitled to relief under the Fourteenth Amendment.

ARGUMENT

AS TO WHETHER THE RIGHT TO BE IMMUNE FROM A SECOND PROSECUTION FOR THE SAME OFFENSE IS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT.

As was said in *Amrine vs. Tines* (C. C. A. 10th), 131 F. 2d 827, in a habeas corpus case involving the question of second jeopardy in a State Court, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment is not generally regarded as a fundamental right protected by the due process and privileges and immunities clauses of the Fourteenth Amendment. We quote from said case as follows:

"The contention of the appellee, upheld by the trial court, that he was twice placed in jeopardy for the same offense in violation of his constitutional rights, like the question of the right to assistance of counsel, must rest upon the dominant command of the Fourteenth Amendment. And, unlike the fundamental right to assistance of counsel granted by the Sixth Amendment to the Constitution, *the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process.* *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597; *Dreyer v. State of Illinois*, 187 U. S. 71, 23 S. Ct. 28, 47 L. Ed. 79; *Palko v. State of Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Cf. *Hurtado v. People of State of California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Gaines v. State*

of Washington, 277 U. S. 81, 86, 48 S. Ct. 339, 72 L. Ed. 793; see, also, *West v. State of Louisiana*, 194 U. S. 258, 24 S. Ct. 650, 48 L. Ed. 965; *Hague v. C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423." (Emphasis supplied).

As was also pointed out in *Amrine v. Tines*, *supra*, Courts which have had occasion to consider the matter have deliberately refrained from completely closing the door to Federal inquiry and have been content to answer that double jeopardy did not factually exist when measured by the Federal rule. An early case in which the question was left open was *Dreyer v. Illinois*, 187 U. S. 71; and, as late as *Louisiana ex rel. Willie Francis vs. Resweber*, 329 U. S. 459, this Court examined the circumstances under the assumption, "*but without so deciding*," that a violation of the principles of the Fifth Amendment as to double jeopardy would be violative of the due process clause of the Fourteenth Amendment.

Nor is it necessary to decide the question in the case at bar because, as will hereinafter be shown, the facts in this case do not show a second prosecution for the same offense, and do not show that any principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, was violated by the conviction of the petitioner for the manslaughter of Robert Collins under one statute, after the petitioner had been acquitted under another statute of the manslaughter of Charles Peeples in the same transaction and by the same act.

HERE, THERE WERE TWO MATERIALLY DIFFERENT OFFENSES, ONE FOR THE KILLING OF EACH OF THE TWO BOYS KILLED BY THE PETITIONER IN THE SAME ACCIDENT.

An exhaustive Annotation on this question is found

on pages 1053-1066 of Volume 172 of American Law Reports. On page 1062, said Annotation, dealing with "Single act causing injury to or death of two or more persons," says:

"Though the courts recognize that a single act may constitute two or more distinct and separate offenses and a person charged therewith may be punished for all of them, they are not always in accord as to what constitutes distinct and separate offenses arising from a single act. Thus, there is a conflict on the question of how many offenses are committed where two or more persons are injured or killed by a single criminal act in the operation of a motor vehicle. *The majority of courts hold that there are as many separate and distinct offenses as there are persons injured or killed by the unlawful act so that successive prosecutions may be instituted against the person who committed the unlawful act without violating the rule against double jeopardy.*" (Emphasis supplied).

State v. Fredlund (Minn., 1937), 200 Minn. 44, 273 N. W. 353, involved a collision between Fredlund's automobile and a Mr. Busch's automobile. Mrs. Busch and her minor child, Walter Busch, lost their lives in the collision. Separate third degree murder indictments were returned against Fredlund for the killing of Mrs. Busch and the boy. He was acquitted under the indictment charging the killing of Mrs. Busch. Thereafter, he pled this acquittal as a bar to further prosecution under the indictment charging the killing of the boy. The Supreme Court of Minnesota held that Fredlund would not be subjected to double jeopardy by being tried for the killing of the boy after having been acquitted of the killing of Mrs. Busch; and held that, although the same act caused the death of both, two separate and distinct offenses were committed. Among the cases relied upon

by Fredlund were two of the cases cited by the petitioner herein, viz., State vs. Wheelock, 216 Iowa 1428, 250 N. W. 617, and State vs. Cosgrove, 103 N. J. L. 412, 135 A. 871, but the Minnesota Court rejected the doctrine of said cases. Said Court said, in part, that:

"In the instant case the same act caused the death of two different persons. Obviously the proof of the death of Mrs. Busch cannot possibly acquit or convict defendant of the killing of the child. The only thing determined by the prior adjudication is that as to her death the proof of defendant's misconduct was found insufficient to fasten guilt upon him. This is necessarily so because, by Mason's Minn. St. 1927, § 10066, it is provided: 'No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant, as alleged, are each established as independent facts.'"

It is apparent that the Minnesota statute cited in the foregoing excerpt did no more than require that the corpus delicti of the homicide be proved, a universal requirement which is in force in Florida without the necessity of statute.

In the Fredlund case, *supra*, the Minnesota Supreme Court also said, in part, that:

"If this were a civil case no one would contend that a verdict exonerating defendant for the death of the mother would in any way impede the right of the son's administrator from proceeding with an action for recovery of damages for death by wrongful act. The result in the mother's trial would not even be considered material to the issues. There can be no doubt then that, if we were to hold with defendant here, we should be compelled to give a wrongdoer, liable as such under the law relating to civil liability, immunity

from criminal punishment for identical acts. In other words, as a tort-feasor defendant could be held to liability, but as to the sovereign state he would be immune. Such result seems to us to be wholly unjustifiable. Surely the wrong to an individual should not be placed upon a higher plane than the same criminal act which gave rise to the civil liability."

* * * *

"In view of present-day conditions, where murderous gangs by means of high powered machine guns, sawed-off shotguns, and the like often cause death to our citizens, and where great bodily injury or death to many may be the result of a single discharge of such weapons, it would indeed be a sad condition of affairs were we to give a narrow construction to the state's right to protect its people. The maxim for which defendant contends was not designed to foster crime but to protect the accused from double jeopardy where in point of fact the criminal act caused a particular individual the harm against which the law is directed. Obviously, we think, it was not intended to be a shield for the murderer behind which he may hide. Other illustrations can easily be made. Thus one might poison a well from which many persons might die because the water therefrom was used by many persons residing in that locality. One might throw a bomb into a large crowd of people and thereby injure many and possibly kill several. Is it reasonable that such well poisoner and bomb thrower should be held immune to prosecutions for the death of his other victims because on the trial of one so killed he was acquitted? The answer is obvious. No reasonable person would be likely to consider such result possible."

In *Fay v. State* (Okla., 1937), 62 Okla. Crim. 350, 71 P. 2d 768, Fay was charged with assault with intent to kill Genella Brewer with an automobile. He pled

former jeopardy because he had already been convicted of an assault upon Betty Joe Brewer, who was also injured by his car at practically the same time and place. In rejecting his contention and in holding that two offenses were committed, the Oklahoma Court aligned itself with the Courts which hold that, where two or more persons are injured by a single criminal act, there are as many separate and distinct offenses as there are persons injured by the unlawful act. We quote from said case as follows:

"While the authorities are not in harmony on the question involved in this case, we hold that the greater weight of respectable authorities sustains the contention of the state that, notwithstanding the fact that the injury of the Brewer girls was caused by the car of the defendant striking them at or near the same time and place, injury to each of the girls constitute a separate offense, and that the contention of the defendant that he could not be put on trial for the injury to Genella Brewer, after he had been tried and convicted and his case pending in the Criminal Court of Appeals for the injury of Betty Joe Brewer, is without merit. *This court holds that where two or more persons are injured by a single criminal act, there are as many separate and distinct offenses as there are persons injured by the unlawful act.*" (Emphasis supplied.)

In *Fleming v. Commonwealth* (Ky., 1940), 284 Ky. 209, 144 S. W. 2d 220, Mr. and Mrs. Duval were walking along the highway, and Stapleton was a few feet behind them. Fleming drove his truck against them, killing Duval and Stapleton. Fleming was convicted of involuntary manslaughter because of the killing of Duval. He pled this conviction as former jeopardy when he was charged with the voluntary manslaughter of Stapleton. The trial court disagreed with him and he appealed. The

Court of Appeals of Kentucky rejected his contention in words as follows:

"We find no merit whatever in the contention that the plea of former jeopardy should have prevailed. This court has definitely decided that where one criminal act results in injury to two or more persons the perpetrator of the act may be tried and convicted as a result of the perpetration of the act on each of the injured parties. For instance, in *Com. v. Browning*, 146 Ky. 770, 143 S. W. 407, it was held that where two or more persons were wounded by the same shot the conviction for shooting one was not a bar to a prosecution for shooting the other. The authorities generally seem to be in accord on this proposition."

Lawrence v. Commonwealth (Va., 1943), 181 Va. 582, 26 S. E. 2d 54, involved a collision between Lawrence's automobile and a beach wagon in which Ralph Yonkers and Alvin Montgomery were riding. Both Yonkers and Montgomery were killed. When charged with the killing of Montgomery, Lawrence pled former jeopardy by reason of the fact that he had already been convicted of the killing of Yonkers. The Supreme Court of Virginia held that there were two offenses and held that Lawrence's plea of *autrefois acquit* was properly rejected. Said Court said, in part:

"We have no intention of whittling away the responsibility of careless or reckless drivers. A list of our dead is eloquent in their denunciation as are the facts in this case."

In *People v. Allen* (Ill., 1937), 368 Ill. 368, 14 N. E. 2d 397, (*Appeal dismissed and certiorari denied in 308 U. S. 511*) Allen's automobile struck three men who were walking abreast across the street. Two of these men, Duran and Klafter, died as the result of the collision.

When Allen was charged with involuntary manslaughter by reason of the killing of Klafter, he pled former jeopardy because he had been discharged in a case in which he had been prosecuted for the involuntary manslaughter of Duran. (The Supreme Court of Illinois held that the discharge was a bar to another trial for the killing of Duran). The Illinois Court reviewed conflicting decisions on the question and decided that the killing of Duran and Klafter were separate offenses and that there was no former jeopardy. In arriving at this decision, the Court considered and rejected the doctrine of *State vs. Cosgrove*, 103 N. J. L. 412, 135 A. 871, *State vs. Wheelock*, 216 Iowa 1428, 250 N. W. 617; *Commonwealth vs. Veley*, 63 Pa. Super. 489; and *Commonwealth vs. Ernesto*, 93 Pa. Super. 339, which cases are strongly relied upon by the petitioner in the case at bar. Also, said Court said, in part:

"Applying these principles to the facts in this case, the question presented is: Could a jury in the former case, which charged the manslaughter of Ray Duran, have returned a verdict for the manslaughter of Charles Klafter? In indictments for offenses against persons or property the name of the person injured must be stated, if known. The necessity for stating the name of the person injured is to enable the defendant to plead either a former acquittal or conviction in case of a second prosecution for the same offense. People v. Clavey, 355 Ill. 358, 189 N. E. 364; People v. Smith, 341 Ill. 649, 173 N. E. 814; Aldrich v. People, 225 Ill. 610, 80 N. E. 320; Willis v. People, 1 Scam. 399. An accused cannot be tried for the manslaughter of any other person than the one charged by the indictment upon which he is then being tried. The substance of one crime cannot be proved by proving the substance of another. State v. Billotto, supra. A conviction or acquittal under one charge is a bar to a prosecution for another crime growing out of the same act only where the offense for

which the accused was tried and acquitted or convicted is but one of the degrees of the same offense for which it is later attempted to put him on trial. *People v. Fox*, supra. In order for one prosecution to be a bar to another, it is not sufficient to show that the act is the same, but it must be shown that the offense, also, is the same in law and in fact. *People v. Fox*, supra; *People v. Mendelson*, supra; *Nagel v. People*, supra." (Emphasis supplied).

* * * *

"Adhering to the general rule and our former decisions in analogous cases, we hold that the deaths of Ray Duran and Charles B. Klafter named in the separate indictments were separate offenses. The trial court properly denied defendant's petition for discharge."

In *State v. Taylor* (Wash., 1936), 185 Wash. 198, 52 P. 2d 1252, Taylor's automobile collided with McAllister's automobile. Five people were killed, some being passengers in Taylor's car and some being passengers in McAllister's car. In five separate counts of an information, Taylor was charged with manslaughter by reason of the killing of these five persons, each count charging the death of one of said persons. He was convicted under Counts 1, 3 and 5, and was acquitted under Counts 2 and 4. He applied for and obtained a new trial. Then, he filed a plea of former acquittal and a motion for dismissal of Counts 1, 3 and 5, upon the ground that all five counts had charged the identical and same facts and act and that therefore the acquittal under Counts 2 and 4 barred further proceedings under Counts 1, 3 and 5. The trial court sustained his position and discharged him from further prosecution. The State appealed. The Supreme Court of Washington reversed the order, holding that even though two persons are killed by the same act, each killing constitutes a separate crime.

In line with the majority rule followed in the above cited cases, the Supreme Court of Florida held in the case at bar (*McHugh vs. State*, 36 So. 2d 786) that the killing of Charles Peeples and Robert Collins were separate offenses. The Florida Court pointed out that:

"Double jeopardy applies to the offense, not the act causing the criminal offense. The gist of this offense is the unlawful homicide of which there were two. There is an offense for each unlawful homicide. It is not difficult to imagine a case where a defendant might by criminal negligence cause an explosion which would annihilate a number of persons. Great difficulty might arise on proving the actual death of one particular individual, yet it would be a travesty on justice to say that the wrongdoer could not then be again arraigned for the criminal killing of some other named victim. In the two imaginary cases the evidence would be different thereby observing the distinction noted and discussed in *Driggers v. State*, 137 Fla. 182, 188 So. 118 and other cases cited there.

"One of the tests often required by this and other courts is whether the evidence will be the same in each prosecution.

"It is well to point out here that in addition to the difference in identity of the victims the statute requires different proof in other respects. In one case the state was required to prove culpable negligence. Intoxication, instead of culpable negligence, is required in the other. See *State v. Bacon*, *supra*. Each is a separate offense."

The said majority rule is in line with the principles laid down by this Court.

In the case of *Burton v. United States*, 202 U. S. 344, this Court said:

"A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, 'was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.' Commonwealth v. Roby, 12 Pick. 496, 504."

"It is well settled that 'the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.' 1 Bishop's Crim. Law, § 1051; Wilson v. State, 24 Connecticut 57, 63, 64." (Emphasis supplied).

In *Gavieres v. United States*, 220 U. S. 338, this Court said:

"In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in *Morey v. Commonwealth*, 108 Massachusetts 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

" 'A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he had been put in jeopardy for the same offense. *A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.*'

"This case was cited with approval in *Carter*

v. McClaughry, 183 U. S. 367,395." (Emphasis supplied).

* * * *

"In *Burton v. United States*, 202 U. S. 344, Bishop's Criminal Law, vol. 1, § 1051, was quoted with approval to the effect 'jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.' In that case this court said, speaking of a plea of *autrefois acquit*, 'It must appear that the offense charged, using the words of Chief Justice Shaw, was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.'"

In *Ebeling v. Morgan*, 237 U. S. 625, this Court said:

"As we interpret the statute, the principle applied in *Gavieres v. United States*, 220 U. S. 338, is applicable, where this court held that, when in the same course of conduct, and upon the same occasion, certain rude and boisterous language was used, and an officer insulted, two offenses were committed, separate in their character, and this, notwithstanding the transaction was one and the same. The principle stated by the Supreme Judicial Court of Massachusetts, in *Morey v. Commonwealth*, 108 Massachusetts, 433, was applied, where it was held that *a conviction upon one indictment would not bar a conviction and sentence upon another indictment, if the evidence required to support the one would not have been sufficient to warrant the conviction upon the other without proof of an additional fact, and it was there declared that a single act might be an offense against each statute, if each required proof of an additional fact which the other did not, and that conviction and punishment under one does not exempt the defendant from conviction and punishment under the other statute.*" (Emphasis supplied).

The case at bar comes within the rules thus laid down by this Court in the *Burton*, *Gavieres* and *Eberling* cases, *supra*, because (1) in the case at bar the evidence required to support the information for the manslaughter of Charles Peeples would not have been sufficient to support the information for the manslaughter of Robert Collins without proof of an additional fact, and the evidence required to support the information for the manslaughter of Robert Collins would not have been sufficient to support the information for the manslaughter of Charles Peeples without proof of an additional fact; and (2) each of the statutes under which said informations were framed required proof of an additional fact which the other did not.

In the first case, wherein the petitioner was acquitted, he was charged with the manslaughter of *Charles Peeples*. The State was required to make good the allegation that the petitioner took the life of *Charles Peeples*; it was compelled to prove the corpus delicti; which included proof that *Charles Peeples* was killed. In the second case, wherein the petitioner was convicted, he was charged with the manslaughter of *Robert Collins*, and proof of the corpus delicti necessarily included proof that the petitioner took the life of *Robert Collins*. Proof of Robert Collins' death would not have answered the obligation resting upon the State in the first case to prove the death of Charles Peeples and conversely, proof of Charles Peeples' death would not have answered the obligation resting upon the State in the second case to prove the death of Robert Collins.

In other words, there was no double jeopardy because the evidence required to support the one charge would not have been sufficient to warrant a conviction on the other charge without proof of an additional fact.

Furthermore, the information against the petitioner

for killing *Charles Peebles* charged that the petitioner (Tr. 6):

" . . . did then and there by his act, procurement and culpable negligence operate a certain motor vehicle in such negligent, careless and reckless manner as to run into, upon and against *Charles Peebles*, with such force and violence as to inflict in and upon the body of the said *Charles Peebles* then and there died, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Florida . . ."

and said information was framed under Section 782.07, Florida Statutes 1941, which reads as follows:

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars."

On the other hand, the second count of the information against the petitioner for killing *Robert Collins* (Tr. 3-4), under which the petitioner was convicted (Tr. 9-10), charged that the petitioner:

" . . . did then and there unlawfully, *while intoxicated*, drive a certain motor vehicle, to-wit: an automobile, a further more particular description of said automobile, being to the County Solicitor unknown, which he, the said *Grady Lee McHugh*, was then and there driving upon and along the public highways of *Dade County, Florida*, and by driving and operating said motor vehicle as

aforesaid, *while intoxicated* as aforesaid, did then and there strike, wound and injure one Robert Collins, and by thus striking the said Robert Collins did inflict in, on and upon his said body and head, a certain mortal wound, a further and more particular description of said mortal wound, being to the County Solicitor unknown, of and from which said mortal wound, the said Robert Collins did then and there die, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida." (Emphasis supplied).

and said information was framed under that part of Section 860.01, Florida Statutes 1941, reading as follows:

" . . . and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter and, on conviction be punished as provided by existing law relating to manslaughter."

Section 782.07 requires proof of culpable negligence, but Section 860.01 does not. On the other hand, Section 860.01 requires proof of driving while intoxicated, but Section 782.07 does not. Therefore, each statute requires proof of an additional fact which the other does not. For this reason, also, there was no identity of offenses and, consequently, no double jeopardy.

THE PETITIONER'S ACQUITTAL IN THE FIRST CASE DID NOT NEGATIVE EVERY MATERIAL ALLEGATION OF THE INFORMATION UPON WHICH HE WAS CONVICTED IN THE SECOND CASE.

The petitioner cites *Cannon v. State*, 91 Fla. 214, 107 So. 360, as authority for his contention that the acquittal in the first case negated every material allegation in the second case. We do not think that the *Cannon* case supports said contention.

In the Cannon case, the indictment charged manslaughter by culpable negligence, and was held sufficient to charge that offense.

In the Cannon case, the indictment also contained the words, "being at the time under the influence of intoxicating liquor." The Court held that these words were surplusage, they not being essential to the charge laid. The Court also held that these words were not the equivalent of the words "while intoxicated," as used in the statute proscribing manslaughter committed by the operation of a motor vehicle while intoxicated. The Court also held that, under an information charging manslaughter by culpable negligence, it was permissible to show that the defendant was under the influence of intoxicating liquor at the time of the accident, because persons under the influence of intoxicants to any considerable degree are more apt to be heedless, reckless and daring. The Court did not hold that it is necessary to prove the defendant was under the influence of intoxicating liquor in order to make out a case of manslaughter by culpable negligence.

Nor did the Court hold in the Cannon case that a charge under the manslaughter by culpable negligence statute and a charge under the manslaughter by driving while intoxicated statute constituted but one offense and could be coupled in the same count. What the Court did say was that "in certain cases" it is allowable to charge two separate and distinct offenses in the same count as constituting but one offense, where "a statute" makes either of two or more distinct acts, connected with the same general offense and subject to the same punishment, indictable as distinct crimes.

That the petitioner has misconstrued the Cannon case is evidenced by the same Florida Supreme Court's

opinion in the case at bar (36 So. 2d 786), in which it was said:

"It is well to point out here that in addition to the difference in identity of the victims the statute requires different proof in other respects. *In one case the state was required to prove culpable negligence. Intoxication, instead of culpable negligence, is required in the other.* See *State v. Bacon*, supra. *Each is a separate offense.*" (Emphasis supplied).

Thus, the Florida Court unequivocally held that "*Each is a separate offense,*" and that manslaughter by culpable negligence is not the same offense as manslaughter committed by the operation of an automobile while intoxicated.

The petitioner's acquittal under the first information for the *culpably negligent* killing of *Charles Peebles* did not negative the averment of the second information that the petitioner was driving "*while intoxicated*" when he killed *Robert Collins*.

CONCLUSION

The due process clause of the Fourteenth Amendment prevents State action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Snyder v. Massachusetts*, 291 U. S. 97). It proscribes that which constitutes a denial of fundamental fairness, shocking to the universal sense of justice (*Betts v. Brady*, 316 U. S. 455).

If it should be thought that the due process clause applies to double jeopardy in State courts, then we submit that the due process clause does not require any such definition of double jeopardy as is contended for by the petitioner.

To hold a person accountable for each life that he criminally takes falls a long way short of offending any "principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental." The reverse is true. A fundamental principle of justice rooted in the traditions and consciences of our people is that a man should receive punishment for the criminal homicide of each person unlawfully killed by him, and that he should not escape his just deserts for the killing of one person merely because he has managed to obtain an acquittal for the killing of another person by the same act.

The decision of the Florida Supreme Court, holding that the petitioner was not subjected to double jeopardy, does not constitute a "denial of fundamental fairness, shocking to the universal sense of justice." The fact that the majority of the courts which have passed on the same point agree with the Florida Court, conclusively refutes any idea that such a holding is shocking to the universal sense of justice.

We submit that no fundamental unfairness entered in the Florida Court's decision that there was no double jeopardy, and we submit that the petitioner is entitled to no relief at the hands of this Court.

Respectfully submitted,

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